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No. 03-8661

In The
Supreme Court of the United States
October Term, 2004

Melvin T. Smith,
petitioner

v.

Commonwealth of Massachusetts,
respondent

On Petition for Writ of Certiorari
to the Appeals Court of the Commonwealth of Massachusetts

Petitioner's Brief in Reply to Respondent's Opposition to Petition for Writ of Certiorari

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The questions presented, citations to the opinions below, statement of jurisdiction, constitutional and statutory provisions involved in this case, concise statement of the case, and reasons for granting the petition are all set out in Smith's petition for certiorari.

Argument

I. The government argues that no double jeopardy violation occurred because the judge's reconsideration of her finding of not guilty did not subject Smith to a second trial before a second fact-finder. As a matter of law, Arizona v. Rumsey indicates otherwise. As a matter of fact, there were additional prohibited fact-finding proceedings after the judge declared Smith to be not guilty. This unconstitutionally placed Smith twice in jeopardy.

The government and the Massachusetts Appeals Court cling to the theory that no double jeopardy violation occurred in Smith's case because the judge's

entry of a verdict of not guilty at the close of the government's case "could be corrected without subjecting him to a second trial before a second trier of fact."[1]

First, the government's position is wrong as a matter of law. This Court rejected a closely related argument in Arizona v. Rumsey.[2] There, the trial judge was the sole trier of fact for Rumsey's death penalty sentencing hearing.[3] Due to a purely legal error, the trial judge rejected the death penalty and sentenced Rumsey to life in prison. The conviction was appealed. The appellate court noted the legal error, affirmed the conviction of capital murder but remanded for a new sentencing hearing.[4] No new evidence was presented on remand, only legal arguments were heard before the same judge.[5] Nevertheless, this Court held that the prohibition against double jeopardy barred any further proceedings.[6] So too, in Smith's case, the judge's unequivocal finding of not guilty barred further proceedings including "reconsideration" and submission of the indictment to the jury. Under Rumsey, this is so regardless of whether either party presented additional evidence on that charge. (The tenor of the earlier, more factually convoluted case of Sanabria v. United States[7] also supports this conclusion.)

Second, the government's position is wrong as a matter of fact. There were additional fact-finding in Smith's case after the judge granted and then reconsidered her finding of not guilty. After the judge ruled (twice) on the question of whether a reasonable jury could conclude beyond a reasonable doubt

[1] Resp. Opp. at 12-13; App. 3a (quoting United States v. Wilson, 420 U.S. 332, 345 (1975)).
[2] Arizona v. Rumsey, 467 U.S. 203, 211 (1984).
[3] Rumsey, 467 U.S. at 205; but see Ring v. Arizona, 536 U.S. 584 (2002).
[4] Rumsey, 467 U.S. at 206-207.
[5] Rumsey, 467 U.S. at 207.
[6] Rumsey, 467 U.S. at 211.

that the Commonwealth had proven each element beyond a reasonable doubt,[8] a second fact-finder (the jury) continued on to consider the defendant's case and make the distinct factual determination of whether they believed that the Commonwealth had *actually* proven each element beyond a reasonable doubt.[9] Those are further fact-finding proceedings, barred by the prohibition against double jeopardy.

II. There is a split of authorities among the lower courts on this important question.

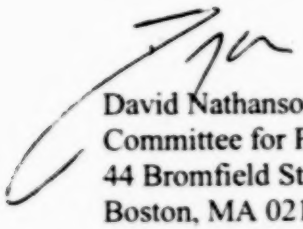
The government contends that Smith's case is not appropriate for certiorari because there is no split of authorities among the lower courts.[10] But, the government then goes on to recount the split,[11] as Smith did in his petition.[12] No matter how the government characterizes it, it has essentially admitted that there is a split of authorities on this important question. That position is well taken, given that this Court recently granted certiorari in Price v Vincent,[13] a case presenting a nearly identical issue. But the Court was unfortunately unable to reach the substantive question in Vincent because of that case's procedural complications.[14] Where Vincent did not reach the issue, the issue is assuredly just as important and as uncertain today as it was one year ago when the Court decided Vincent.[15]

[7] Sanabria v. United States, 437 U.S. 54, 69 (1978).
[8] Jackson v. Virginia, 443 U.S. 307 (1979).
[9] In re Winship, 397 U.S. 358, 361 (1970).
[10] Resp. Opp. at 7.
[11] Resp. Opp. at 8-10.
[12] Pet. for Cert. at 7-8.
[13] Price v. Vincent, 538 U.S. 634, 123 S. Ct. 1848, 1854-55, 155 L. Ed. 2d 877 (2003).
[14] Vincent, 123 S. Ct. at 1854-55.
[15] http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-524.pdf (visited December 29, 2003).

Conclusion

This Court should grant the defendant's petition for a writ of certiorari.

Respectfully submitted,



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